IN THE SUPREME COURT OF MISSOURI

No. 83837

State of Missouri *ex rel.*

ANNA L. NICKELS,

Petitioner-Relator,

vs.

HONORABLE DAVID LEE VINCENT, III,
and **HONORABLE FRANK CONLEY**,
Respondents.

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This is an action for a remedial writ, seeking an order requiring Respondents, the Honorable David Lee Vincent, III, of the Circuit Court of St. Louis County, and the Honorable Frank Conley, of the Circuit Court of Boone County, to transfer the underlying case from Boone County back to St. Louis County and to reinstate Relator's claims against Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark"), as well as to reinstate all other claims of Relator which may have been dismissed. On January 5, 2001, Relator filed suit against various Defendants in the Circuit Court of St. Louis County, alleging venue was proper because Lifemark had a registered agent in that county. Thereafter, Lifemark moved to dismiss for pretensive joinder and other defendants moved for transfer to Boone County, alleging venue to be improper in St. Louis County. On May 18, 2001, Respondent the Honorable David Vincent Lee, III, issued a Judgment and Order dismissing Relator's claims against Lifemark with prejudice, and ordering the case transferred to the Circuit Court of Boone County. Relator filed an application for a remedial writ in the Eastern District of the Court of Appeals on June 8, 2001, which was denied on July 5, 2001. On July 31, 2001, Relator filed her application for a writ in this Court, which issued its preliminary writ on August 21, 2001. This Court has jurisdiction under Mo. Const., Art. 5, §4(1) to issue remedial writs.

STATEMENT OF FACTS

On January 5, 2001, Relator Anna L. Nickels ("Miss Nickels") filed a personal injury suit against various defendants in the Circuit Court of St. Louis County. [Rel. Writ Ex. A, Rel. Pet. at Vol. 2, 50-79.] The case was assigned to Respondent, the Honorable David Lee Vincent, III ("Judge Vincent"), sitting in Division 9 of the Circuit Court of St. Louis County.

Although there are claims against multiple defendants in the Petition in the underlying case, the only allegations which will be dealt with in detail from the Petition are the allegations against Defendants James T. Brocksmith, D.O. ("Dr. Brocksmith"); Carol B. Danuser, M.D. ("Dr. Danuser"), and Lifemark Hospitals of Missouri, Inc. ("Lifemark").

Count I [generally, Rel. Writ Ex. A, Rel. Pet. at Vol. 2, 50-72] alleged in pertinent part that Drs. Brocksmith and Danuser held themselves out to be skilled and competent physicians [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 52, ¶¶ 7, 8]; that Lifemark was engaged in the business of providing health care services to the general public, including but not limited to Miss Nickels, as a hospital, and doing so under the name of Columbia Regional Hospital [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 52-53, ¶9]. Lifemark employed various nurses, technicians and other personnel to provide health care goods and services to members of the general public, including Miss Nickels. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 55, ¶12.]

Miss Nickels alleged that Drs. Brocksmith and Danuser were the ostensible

agents of Lifemark because: (a) she did not have any voice in the selection of physicians or other personnel to meet her health care needs while at the hospital; (b) she did not select Drs. Brocksmith and Danuser to provide health care services to her; (c) no one acting on behalf of the hospital told her that Drs. Brocksmith and Danuser were not agents, servants or employees of the hospital; (d) neither Dr. Brocksmith nor Dr. Danuser informed Miss Nickels of the nature of their business relationship with the hospital, *i.e.*, neither physician informed her that they were not agents, servants or employees of the hospital; (e) Miss Nickels reasonably believed that Drs. Brocksmith and Danuser were hospital employees; (f) Miss Nickels relied on the hospital to provide her with skilled, qualified and competent physicians and other health care personnel, and (g) the hospital knew or should have known that Drs. Brocksmith and Danuser were acting as the ostensible agents of the hospital and thereby acquiesced in, or ratified, that relationship, thus making the hospital vicariously liable for the negligent acts or omissions of Drs. Brocksmith and Danuser. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 55-56, ¶¶ 17-24.]

The Petition alleged that venue was proper in St. Louis County under §508.010, R.S.Mo. 1994, as there were both corporate and individual defendants, and Lifemark had its registered agent in St. Louis County. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 56, ¶ 25.]

Paragraphs 26 through 41 alleged the primary chronology of the health care

services provided or not provided to Miss Nickels which are at issue in the underlying case. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 57-59, ¶26- 41.] Paragraphs 42 and 43 alleged that a duty of continuing care existed at least through January 12, 1999. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 59, ¶¶ 42-43.]

Paragraphs 51 and 52 of the Petition alleged the existence of Dr. Brocksmith's duty to Miss Nickels and how he breached that duty. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 66-67, ¶51-52.] Paragraphs 53 and 54 alleged the existence of Dr. Danuser's duty to Miss Nickels, and how she breached that duty. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 67-68, ¶¶ 53-54.] Paragraphs 55 and 56 alleged the existence of a duty to Miss Nickels on the part of the hospital and its personnel, and how the hospital personnel breached that duty. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 68-69, ¶¶ 55-56.]

Paragraph 59 of Count I alleged that as a result of the joint and several negligence of the various defendants, Miss Nickels suffered the damages specified in that paragraph.

In Count II, Miss Nickels alleged that based on the allegations of Paragraphs 1 through 58 of Count I, Drs. Brocksmith and Danuser caused Miss Nickels to be deprived of a statistically significant chance of recovery of at least 90%. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 74, ¶ 2.]

In Count III, Miss Nickels asserted a claim against Lifemark for corporate

negligence, *i.e.*, that the hospital had a direct and nondelegable duty "to use reasonable care in the maintenance of safe and adequate facilities and equipment; to select and retain only competent physicians; to oversee all persons who practice medicine in its facilities to ensure the patient's safety and well-being while in the hospital, and to formulate, adopt and enforce adequate rules and policies to ensure quality health care for patients, including Miss Nickels." [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 76-77, ¶ 5.]

Paragraph 6 of Count III alleges the breach of three of the four listed nondelegable duties: the duty of safe and adequate facilities and equipment (¶ 6(a)); the duty to oversee those who practice medicine in the hospital (¶ 6(d), ¶ 6(f)), and the duty to adopt and enforce adequate rules and polices (¶ 6(b), ¶ 6(c), ¶ 6(e)).

On January 5, 2001, Miss Nickels' counsel requested the issuance of a summons for service by first class mail on Lifemark, via its registered agent in St. Louis County. [Rel. Writ Ex. B, Rel. Pet., Vol. 2 at 80-81.] On January 22, 2001, the Missouri notice and acknowledgment form was mailed to Lifemark's registered agent in St. Louis County. [Rel. Writ Ex. C, Rel. Pet., Vol. 2 at 82-84.]

On January 29, 2001, Defendant David Steinke, D.O., served a motion to dismiss, alleging in part that "venue is not properly before this Court." [Rel. Writ Ex. D, Rel. Pet., Vol. 2 at 85, ¶ 3.]

On February 7, 2001, Defendant James T. Brocksmith, D.O., served a mo-

tion to dismiss, alleging in pertinent part that venue was pretensive because Miss Nickels failed to state a claim upon which relief could be granted [Rel. Writ Ex. E, Rel. Pet., Vol. 2 at 87, ¶ 3]; that venue was improper as to all other defendants because they did not reside in St. Louis County [Rel. Writ Ex. E, Rel. Pet., Vol. 2 at 87-88, ¶ 4], and that venue was pretensive "because Plaintiff and her counsel could not have had a reasonable good faith belief of liability on the part of the purported venue anchor defendant, Lifemark."

Miss Nickels filed a written response to Dr. Brocksmith's motion to dismiss. [Rel. Writ Ex. F, Rel. Pet., Vol. 2 at 92-97.]

On February 20, 2001, Lifemark filed its own motion to dismiss, alleging in pertinent part that "venue is not proper in this Court" [Rel. Writ Ex. G, Rel. Pet., Vol. 2 at 98, ¶ 2] and that Miss Nickels failed to state a claim against Lifemark upon which relief could be granted [Rel. Writ Ex. G, Rel. Pet., Vol. 2 at 98, ¶ 3].

Thereafter, Lifemark filed Suggestions in Support of its Motion. [*See generally*, Rel. Writ Ex. H, RP 100-137], accompanied by an affidavit from Dr. Brocksmith [Rel. Writ Ex. H-1, RP 138-140], an affidavit from James C. Poehling [Rel. Writ Ex. H-2, RP 141-146] and an affidavit from Nancy Mueller, accompanied by various hospital medical records [Rel. Writ Ex. H-3, Rel. Pet., Vol. 2 at 147-193].

On March 16, 2001, Defendants Peter K. Buchert, M.D., and Columbia Orthopaedic Group, L.L.P., served a motion to dismiss (combined with other re-

quests for relief), which alleges in pertinent part that venue is pretensive in St. Louis County "as plaintiff fails to state a recognizable cause of action or claim against defendant Lifemark" [Rel. Writ Ex. I, Rel. Pet., Vol. 2 at 195, ¶ 3]; that venue is improper as to the other defendants because they all reside or practice in Boone or Morgan Counties [Rel. Writ Ex. I, Rel. Pet., Vol. 2 at 195, ¶ 4] and that venue is pretensive "because plaintiff and her counsel could not have had a reasonable good faith belief of liability on the part of the purported anchor defendant Lifemark" [Rel. Writ Ex. I, Rel. Pet., Vol. 2 at 195, ¶ 5].

On May 9, 2001, a hearing was held by Judge Vincent with reference to the issue of pretensive joinder. [Affidavit of Sean W. Pickett, Rel. Writ Ex. J, Rel. Pet., Vol. 2 at 206, ¶ 4-5; Minutes of Proceedings, Rel. Writ Ex. N, Rel. Pet., Vol. 2 at 221.] During the course of the hearing, Judge Vincent stated that if he was going to consider anything outside the pleadings in ruling on the issue of pretensive joinder he would give the parties notice and allow Miss Nickels thirty days to respond. [Rel. Writ Ex. J, Rel. Pet., Vol. 2 at 207, ¶ 6.] No such notice was given by Judge Vincent. [Rel. Writ Ex. J, Rel. Pet., Vol. 2 at 207, ¶ 7.]

On May 18, 2001, Judge Vincent issued his "Judgment and Order Transferring Venue to Boone County Circuit Court." [Rel. Writ Ex. L, Rel. Pet., Vol. 2 at 211.]

A copy of the computer "minutes" for the underlying case in the Circuit

Court of St. Louis County shows (as of the fax date of June 12, 2001) that Miss Nickels' claims against all Defendants other than Lifemark were dismissed without prejudice. [Rel. Writ Ex. N, Rel. Pet., Vol. 2 at 221, entry for 05-18-01, item 4.]

A copy of the computer "minutes" for the underlying case in the Circuit Court of St. Louis County (as of the fax date of June 23, 2001) shows that all references to the dismissal without prejudice of the other claims have been deleted. [Rel. Writ Ex. O, Rel. Pet., Vol. 2 at 226, entry for 05-18-01, item 4.]

Relator filed a petition for a remedial writ in the Eastern District of the Court of Appeals, which was denied on July 5, 2001. [Rel. Writ Ex. P, Rel. Pet., Vol. 2 at 228.]

On July 31, 2001, Relator filed a petition for a remedial writ in this Court, and this Court issued its preliminary Order on August 21, 2001.

POINTS RELIED ON

POINT I.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because Relator stated multiple claims against Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark"), upon which relief could be granted,

in that under the standards of *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. 1993) (en banc): (a) In Count III Relator sufficiently pled the elements of a claim against Lifemark under the theory of corporate negligence, which is a theory of recovery that might be adopted in the underlying case, and (b) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for "ordinary" vicarious liability arising out of the negligent acts or omissions of its agents, servants and employees under the theories of negligence and a lost chance of recovery, and (c) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for vicarious liability arising out of the negligent acts or omissions of two physicians alleged to be the ostensible or apparent agents of Lifemark, under the theories of negligence and a lost chance of recovery.

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993) (en banc)

Gridley v. Johnson, 476 S.W.2d 475 (Mo. 1972)

State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901 (Mo. 1996) (en banc)

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. 1994) (en banc)

POINT II.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because the various Defendants in the underlying suit who sought dismissal or transfer for pretensive joinder/improper venue failed to meet their burden of proof and persuasion that the record, pleadings and facts presented in support of the motions asserting pretensive joinder established that there is, in fact, no cause of action against Lifemark and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Lifemark in that: (a) Judge Vincent stated he would not consider any matters outside the Petition without first giving notice to the parties and giving Relator an opportunity to respond, and since no such notice was given, any consideration of matters outside the Petition would constitute a violation of Relator's due process rights under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice and a meaningful opportunity to be heard before their claims

against Lifemark can be dismissed with prejudice and the case transferred to Boone County, and (b) even if considered, the matters outside the Petition which were submitted to Judge Vincent were insufficient to establish that all five claims against Lifemark were invalid, in part because the Brocksmith affidavit contained inadmissible hearsay; the Poehling affidavit constituted inadmissible hearsay, and the Mueller affidavit merely certified the accuracy of the photocopying of Miss Nickels' hospital records, and (c) the movants offered no evidence to demonstrate that the state of knowledge of Relator and her counsel at the time the Petition was filed was such that the information would not support a reasonable legal opinion that a case could be made against Lifemark, particularly in view of the allegations of a new theory of recovery proposed to be adopted in the underlying case.

Forms World, Inc. v. Labor and Industrial Relations Commission, 935 S.W.2d 680

(W.D. Mo. App. 1996)

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S. Ct.

652,

94 L. Ed. 865 (1950)

Allen v. St. Luke's Hospital of Kansas City, 532 S.W.2d 505

(W.D. Mo. App. 1975)

State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. 1994) (en banc)

Constitution

U.S. Const., Amd. 14

Mo. Const., Art. I, §10

ARGUMENT

POINT I.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because Relator stated multiple claims against Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark"), upon which relief could be granted in that under the standards of *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. 1993) (en banc): (a) In Count III Relator sufficiently pled the elements of a claim against Lifemark under the theory of corporate negligence, which is a theory of recovery that might be adopted in the underlying case, and (b) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for "ordinary" vicarious liability arising out of the negligent acts or omissions of its agents, servants and employees under the theories of negligence and a lost chance of recovery, and (c) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for vicarious liability arising out of the negligent acts or omissions of two physicians al-

leged to be the ostensible or apparent agents of Lifemark, under the theories of negligence and a lost chance of recovery.

Section 1. Standard of Review

Prohibition is the proper method by which to test whether a trial judge has acted in excess of his jurisdiction because of improper venue. *State ex rel. Reed-craft Manufacturing, Inc. v. Kays*, 967 S.W.2d 703, 707 (S.D. Mo. App. 1998).

The standard of review for a motion to dismiss for failure to state a claim upon which relief can be granted is:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case*. [Emphasis added.]

Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. 1993) (en banc). And in *Sullivan*, cited by this Court in *Nazeri, supra*, this Court held at 512:

> In reviewing the circuit court's dismissal of a petition, the

> Court determines if the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief. We treat the facts averred as true and construe the averments liberally and favorably to the plaintiff. A petition will not be dismissed for failure to state a claim if it asserts any set of facts which, if proved, would entitle the plaintiff to relief. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. banc 1993).

In addition, this Court has said:

> Whether a petition states a claim against defendants for purposes of establishing venue is a difficult issue. *The standard for determining this is less stringent than that required either to grant summary judgment or to sustain a motion to dismiss for failure to state a claim.* We hold that the appropriate standard asks whether, after reasonable inquiry of the law under the circumstances, plaintiffs have put forward a claim either under existing law, under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law. Cf. Rule 55.03(b)(2). [Emphasis added.]

State ex rel. Malone v. Mummert, 889 S.W.2d 822, 825 (Mo. 1994) (en banc).

Section 2. Venue and Pretensive Joinder (Generally)

Where there are multiple defendants, some corporate and some individual, the general venue statute, §508.010, R.S.Mo. 1994, controls, and §508.010(2) authorizes venue in any county in which any defendant resides. *Woodside v. Rizzo*, 772 S.W.2d 20, 21 (W.D. Mo. App. 1989). For purposes of determining venue under §508.010(2), the residence of a corporation is the county in which it maintains its registered agent. *Crites v. Sho-Me Dragways, Inc.*, 725 S.W.2d 90, 93 (S.D. Mo. App. 1987). Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark") has a registered agent in St. Louis County. [Rel. Writ Ex. B, C, Rel. Pet., Vol. 2 at 80-84.] Lifemark's residence for venue purposes is therefore St. Louis County.

This Court said that the standards for determining whether joinder was pretensive are:

> The party claiming that a defendant has been pretensively joined bears both the burden of proof and the burden of persuasion. [*State ex rel. Malone v. Mummert*], 889 S.W.2d [822,] 824 [(Mo. 1994) (en banc)]. This Court has held that:
>
> > Venue is pretensive if (1) the petition on its face fails to state a cause of action against the resident defendant; or (2) the petition does state a cause of action against the resident defendant, but the record, pleadings and facts

> presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant. The standard is an objective one, appropriately denominated as a realistic belief that under the law and the evidence a [valid] claim exists.

State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994) (*quoting State ex rel. Toastmaster v. Mummert*, 857 S.W.2d 869, 870-871 (Mo. App. 1993)), *see also Malone*, 889 S.W.2d at 824-825.

State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902-903 (Mo. 1996) (en banc).

Lifemark is alleged to have owned and operated Columbia Regional Hospital at the time of the events giving rise to the underlying suit, but subsequently sold the hospital to the University of Missouri. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 53-54, ¶¶ 9-11.] At the present time it is unknown whether the University, by contract or otherwise, assumed all the assets and liabilities of Lifemark as of the time of the acquisition. No party has disputed the location of Lifemark's registered agent. Life-

mark's residence for venue purposes is therefore St. Louis County.

The doctrine of *forum non conveniens* does not apply to cases where all parties are residents of Missouri, *Willman v. McMillan*, 779 S.W.2d 583 (Mo. 1989) (en banc) and therefore that doctrine cannot be used as a basis for any transfer of venue. A trial judge has no discretion to disturb a plaintiff's proper choice of venue within Missouri. *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193, 196 (E.D. Mo. App. 1999).

Absent a request for a change of venue pursuant to Mo. R. Civ. P. 51 (which has not occurred in this case), the sole basis on which Judge Vincent might in theory have dismissed Petitioner's claims against Lifemark with prejudice, and ordered the transfer of the case to Boone County, is if Lifemark was pretensively joined in the suit.

The *Breckenridge* standards are disjunctive, and thus offer alternative grounds for a movant to assert pretensive joinder. The first standard is whether the petition, standing alone, fails to state a claim on which relief can be granted. If the petition states a claim on which relief can be granted, then both elements of the second standard must be met to find pretensive joinder, since the two components of the second standard are stated conjunctively. The movants in this case collectively have the burden of proof and persuasion, *Breckenridge*, *supra*, on the issue of pretensive joinder. The following Section will discuss the "failure to state a claim"

standard.

Section 3. "Failure to State a Claim" Argument Generally

Miss Nickels asserted five claims against Lifemark in the underlying case: two in Count I, two in Count II and one in Count III. The first claim (Count I) is that Lifemark is vicariously liable for the negligent acts or omissions of Drs. Brocksmith and Danuser on a theory of ostensible agency, starting at least with Petitioner's admission to the hospital on January 6, 1999, and continuing through at least January 12, 1999. The second claim (Count I) is that Lifemark personnel, *i.e.*, individuals who were actual agents, servants or employees of Lifemark but who are not named defendants in the underlying case, committed the negligence specified in Paragraph 56 of Count I [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 69], and Lifemark is therefore vicariously liable for such negligence. The third claim (Count II) is that the negligence of Drs. Brocksmith and Danuser in that same time frame, for which Lifemark is vicariously liable on a theory of ostensible agency, caused or contributed to cause a lost chance of recovery for Miss Nickels. The fourth claim (Count II) is that the above-identified negligence of Lifemark's personnel/employees caused or contributed to cause a lost chance of recovery for Miss Nickels. The fifth claim (Count III) is based on the doctrine of "corporate negligence" and Miss Nickels alleged that the hospital owed a direct, nondelegable duty of care to Miss Nickels, independent of the negligence of any agent, servant, employee or ostensible agent,

and that that duty of care was breached, thereby causing or contributing to cause damages to Miss Nickels.

The following sections will address each of the five claims in the Petition.

Section 4. Claim 5 (Direct Corporate Negligence)

In *Whittington v. Episcopal Hospital*, 768 A.2d 1144, 1149 (Pa. Super. 2001), the Pennsylvania Superior Court said:

> In *Thompson v. Nason Hospital*, 527 Pa. 330, 591 A.2d 703, 708 (1991), our supreme court first recognized the doctrine of corporate negligence as a basis for hospital liability. The doctrine creates a non-delegable duty upon the hospital to uphold a proper standard of care to a patient and will impose liability if the hospital fails to ensure a patient's safety and well-being at the hospital. *Id.* In outlining the boundaries of the doctrine, the court held that a hospital is directly liable if it fails to uphold any one of the following four duties:
>
> 1. a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
> 2. a duty to select and retain only competent physicians;
> 3. a duty to oversee all persons who practice medicine within its walls as to patient care; and
> 4. a duty to formulate, adopt and enforce adequate rules

and policies to ensure quality care for the patients.

Id. at 707-708.

In *Nason*, the Supreme Court of Pennsylvania cited the following four cases as authority, respectively, for each of the four duties: (1) *Chandler General Hospital v. Purvis*, 123 Ga. App. 334, 181 S.E.2d 77 (1971); (2) *Johnson v. Misericordia Community Memorial Hospital*, 99 Wis.2d 708, 301 N.W.2d 156 (1981); (3) *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946, 86 S. Ct. 1204, 16 L. Ed.2d 209 (1966), and (4) *Wood v. Samaritan Institution*, 26 Cal.2d 847, 161 P.2d 556 (Cal. App. 1945).

The *Darling* case was cited with approval by this Court in *Gridley v. Johnson*, 476 S.W.2d 475, 484 (Mo. 1972), where this Court said in reference to a motion to dismiss for failure to state a claim upon which relief can be granted:

> The petition alleges the hospital held itself out as a "community health center". It is not clear what all this encompasses, but, as said in Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 8: "Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment..." In 15 ALR 3rd 873, 875, it is said: "This task of defining the nature of hospital liability to a patient in connection with his care and treatment will undoubtedly be complicated by the fact that the operations and charac-

teristics of hospitals (and of modern health care generally) have undergone widespread changes over the last few decades, and that most of the rules stated by the courts in the few decisions upon the matter have been drawn with respect to the hospitals and medical practice of another era." Later in the same annotation it is said, 14 ALR 3rd 878: "Whatever may have been the case in earlier times, it seems clear that as organized health care has developed, the hospital, as such, takes an increasingly active part in supplying and regulating the purely medical care which the patient receives... Every doctor using the hospital facilities is ordinarily required to comply with its standards and subject his work to staff consultation, review, and regulation, at paint of losing his staff privileges, a loss which may quite effectively curtail his ability to practice his profession. And every doctor working in a hospital must to a large extent depend upon its laboratory and other technical facilities...in order to effectively carry out his function."

The fact the defendant doctors here were not employees of the defendant hospital does not necessarily mean the hospital cannot be held for adverse effects of treatment or surgery approved by the doctors, *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253, *cert. den.* 383 U.S. 946, 86 S. Ct. 1204, 16 L.

Ed.2d 209.

The doctrine of corporate negligence has never been formally recognized in Missouri, although it was adopted by the Western District of the Court of Appeals in *Harrell v. Total Health Care, Inc.*, — S.W.2d — (W.D. Mo. App. 1989) (WD No. 39809) (Westlaw cite: 1989 WL 153066) [Rel. Writ Ex. M, RP 212-216]. This case became an unpublished disposition, as *Harrell* was transferred to this Court and this Court decided the case on entirely other grounds so that the issue of corporate negligence was not reached. Miss Nickels of course makes no claim that an unpublished disposition has any authority as precedent, but the Western District's opinion *does* offer a basis for inclusion of the theory of recovery in the underlying case as "a cause [of action] that might be adopted in the case," *Nazeri*, *supra*. For example, the Western District said, Slip Opinion at 4, Rel. Pet. Vol. 2 at 214 (right column):

> Acceptance of the doctrine of corporate negligence as a viable theory for liability of hospitals is widespread as evidenced by decisions from Arizona, Colorado, Georgia, Illinois, Michigan and New Jersey, as well as the cases cited above. *See* Annot. 51 A.L.R.3d 981 (1973) and cases cited in *Johnson v. Misericordia Community Hospital*, 99 Wis.2d at 724, 301 N.W.2d at 165. Missouri courts have not directly spoken to the issue but eventual acceptance of the doctrine is

forecast in *Gridley v. Johnson*, 476 S.W.2d 475, 484 (Mo. 1972).

The existence of the *Harrell* unpublished decision, and the decisions in other jurisdictions around the country which have recognized the doctrine of corporate negligence, support a reasonable and realistic belief that, as authorized by *Nazeri*, *supra*, Count III of the petition represents a legitimate cause of action which might be adopted in the underlying case. A review of Count III reveals that Petitioner pled the existence of the four nondelegable duties owed by Lifemark to her; pled that the hospital breached three of the four duties (adequate equipment, adequate supervision of persons providing health care services, adequate rules and regulations), and that as a result of the breach of those duties, Lifemark caused or contributed to cause the injuries identified in Paragraph 59 of Count I.

All the elements of the doctrine of corporate negligence have been pled, and under *Nazeri*, that is all that is necessary to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.

Lifemark, however, has argued that the doctrine is not a theory of recovery currently recognized in Missouri [Rel. Writ Ex. H, Rel. Pet. Vol. 2 at 127-129], and Miss Nickels patently agrees with that assessment of the status of the law. Implicit in making that argument is that because it is not recognized, the theory either can not be recognized, or there has been a failure to state a claim upon which relief can be granted. *Nazeri*, *supra*, expressly authorizes the pleading of new causes of ac-

tion. The law could not develop if the adoption of a new theory of recovery could be prevented by the simple expedient of dismissing the new theory for failure to state a claim upon which relief can be granted—on the ground that it isn't a recognized theory. *Nazeri* prohibits any such result.

Lifemark has also argued that Missouri's peer review statute precludes adoption of this theory:

> Furthermore, Missouri's peer review privilege statute effectively precludes the recognition of the corporate negligence theory i Missouri. This statute provides:
>
> > the proceedings, findings, deliberations, reports and minutes of peer review committees...are privileged and shall not e subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity to be admissible into evidence in any judicial or administrative action for failure to provide appropriate care.
>
> Mo. Rev. Stat. §537.035.4 (Supp. 1999). The term "peer review committee" is broadly defined as "a committee of health care professionals with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services and to exercise any com-

bination of such responsibilities." Mo. Rev. Stat. §537.035.1(2) (Supp. 1999).

Id. at 129. Lifemark then went outside the face of the Petition and asked the Court to consider an affidavit as support for its argument that the peer review statute precludes adoption of the doctrine of corporate negligence. Consideration of anything outside the "four corners" of the Petition is, of course, unequivocally prohibited when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. Lifemark also argued that *every* committee which promulgates rules and regulations regarding patient care or to oversee physicians who practice medicine in the hospital qualifies as a peer review committee, "thus making any records of their proceedings inadmissible and not subject to discovery." *Id.*

As to this latter argument, there is no evidence in the record from which this Court or *any* court could determine that all hospital committees at Lifemark were peer review committees, much less that everything the committees did, including the rules and regulations promulgated by the committees, would be immune from discovery. As the Southern District has pointed out in *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (S.D. Mo. App. 1997), the unsworn statements of an attorney are not evidence, and arguments in a brief are not evidence unless conceded to be true by the opposing party. Nothing within the Petition itself directly or indirectly deals with any putative Lifemark peer review committees, or their actions in un-

known situations, and thus consideration of matters outside the face of the Petition is precluded by the *Nazeri* standards.

The fatal flaw in the peer review argument is the well-established legal principle that "[a]ppellate courts do not render advisory opinions or decide non-existent issues." *Hawkeye-Security Insurance Company v. Davis*, 6 S.W.3d 419, 427 (S.D. Mo. App. 1999); *State ex rel. McNarry v. Stussie*, 518 S.W.2d 630, 638 (Mo. 1974) (en banc), and cases cited therein.

To rule that the doctrine of corporate negligence cannot be adopted because of an alleged conflict with any pre-existing statute would be to issue an impermissible advisory opinion. Such an argument asks the Court to first assume that every scrap of information about physicians who are either employed by a hospital or who have privileges at a hospital is covered by the statute, and then to speculate about what impact the peer review statute might have if and when some future plaintiff who pleads the doctrine of corporate negligence seeks discovery of data that some hospital might want to conceal (correctly or incorrectly) behind the peer review shield. *If* the doctrine is adopted, and *if* some hospital claims the protection of the statute for information a plaintiff seeks in connection with the doctrine, a trial court or an appellate court would then have a specific set of facts upon which to base an interpretation of the relationship, if any, between the peer review statute and the doctrine of corporate negligence. At this point, no such facts exist and the is-

sue is legally non-existent.

Whatever force the Lifemark argument may have is substantially weakened, if not eviscerated, by a portion of the statute that Lifemark did not quote:

> ...provided, however, that information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because it was presented during proceedings before a peer review committee nor is a member, employee, or agent of such committee, or other person appearing before it, to be prevented from testifying as to matters within his personal knowledge and in accordance with the other provisions of this section, but such witness cannot be questioned about testimony or other proceedings before any health care review committee or board or about opinions formed as a result of such committee hearings.

§537.035.4, R.S.Mo. 2000. The peer review statute is not nearly as broad as Lifemark argues and clearly does not cover the breadth of information Lifemark implicitly suggests that the statute covers.

And as this Court said in *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843 (Mo. 1998) (en banc):

> Statutes creating privileges are strictly construed. [Citation omitted.] Claims of privilege are "impediments to discovery of truth," "present

> an exception to the usual rules of evidence," and "are carefully scrutinized." [Citation omitted.] Statutes creating privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" [Citations omitted.]

A statute creating an impediment to ascertaining truth; a statute which must be strictly construed; a statute which says nothing at all about corporate negligence, *i.e.*, the peer review statute, is plainly not a statute which can serve as a basis for denying recognition of a new cause of action in Missouri. But regardless of whether this Court adopts the theory or not, the mere consideration by this Court of the possibility of its adoption is ample proof that it is a theory which Miss Nickels legitimately pleaded under the *Nazeri* standard.

Count III alone warrants return of the underlying case to Judge Vincent in St. Louis County, and reinstatement of all of Miss Nickels' claims against not only Lifemark, but as to all other parties as well, to the extent that as a matter of law those claims may have been dismissed by the original minute entry for May 18, 2001, in the computer system of the Circuit Court of St. Louis County.

Section 5. Claims 2 and 4 ("Ordinary" Vicarious Liability)

It is a well-established principle that a corporation is vicariously liable for the

negligent acts and omissions of its agents, servants and employees. A plaintiff may choose to sue only the negligent employee or only the employer or both, as nothing in the law requires that all potential defendants in a case be sued as a condition precedent to recovery against one or more of them. Thus, regardless of whether a plaintiff knows the name(s) of the negligent employee(s), the corporate employer is still vicariously liable if the necessary elements of the claim are proved at trial.

The second of the five claims (Count I) is for "ordinary" medical malpractice, based on the negligent acts of Lifemark employees who are not named as defendants in the underlying case. It needs no citation to authority to state that the elements of a medical malpractice claim are the existence of a health care provider-patient relationship, a duty owed to the patient by the health care provider, a negligent breach of that duty, and resulting damages.

The fourth claim (Count II) is for "lost chance of recovery," which is also a recognized cause of action in Missouri. The elements of such a claim are a combination of three of the elements of a medical malpractice claim (a health care provider-patient relationship, duty and breach) with damages in the form of a statistically significant loss of a chance of recovery.

Count I unquestionably pleads the existence of a hospital-patient relationship between Lifemark and Miss Nickels. Paragraph 55 of Count I pleads the existence of a duty owed to Miss Nickels by the hospital. [Rel. Writ Ex. A, Rel. Pet., Vol. 2

at 68.] Paragraph 56 of Count I identifies the negligent breach of that duty by Lifemark employees/personnel. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 68.] Paragraphs 56 and 59 identify the damages to Miss Nickels that resulted from the breach of the Lifemark employees' duties. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 68, 71.]

The primary allegations of Count I are incorporated by reference in Count II. Petitioner therefore has pled, in Count II, the existence of a hospital-patient relationship, the existence of a duty, and the breach of that duty. To these allegations Petitioner added the allegation that as a result of the negligent breach of that duty she suffered a statistically significant loss of a chance of recovery.

In Count I, Petitioner pled all the elements of a medical malpractice claim based on the negligence of hospital personnel (Claim 2). Between Count I and Count II, Petitioner pled all the elements of a lost chance of recovery medical malpractice claim. Having pled all the elements of Claims 2 and 4, Petitioner has met the *Nazeri* and *Sullivan* standards and therefore there could be no basis for a determination that either of these claims failed to state a claim upon which relief could be granted.

Section 6. Claims 1 and 3 (Ostensible Agency)

Both "ordinary" medical malpractice and "lost chance" are recognized causes of action in Missouri. In Count I, Petitioner alleged the four elements of a medical malpractice claim against Drs. Brocksmith and Danuser, including but not limited to

Paragraphs 51 through 54, and 59. In Count II, Petitioner alleged the four elements of a lost chance of recovery claim against Drs. Brocksmith and Danuser, drawing the first three elements from Count I, and substituting the allegation of a statistically significant loss of a chance of recovery flowing from such negligence for the allegations of damages in Paragraph 59 of Count I. The "wrinkle" as to Lifemark, is that Petitioner has alleged that based on the doctrine of ostensible agency, Lifemark is vicariously liable for the negligence of Drs. Brocksmith and Danuser. Under *Nazeri* and *Sullivan*, therefore, the only issue is whether Petitioner sufficiently pled the elements of a claim of ostensible agency.

The elements of "ostensible agency" or "apparent authority" have been stated in *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 386 (E.D. Mo. App. 1999):

> To establish apparent authority, a plaintiff relying on such authority must show: (1) the principal consented or knowingly permitted the agent to exercise authority; (2) the person relying on such authority in good faith had reason to believe and actually believed the agent possessed authority; and, (3) the person relying on the authority changed his position and will be injured if the principal is not bound by the transaction executed by the agent. [Citation omitted.] Apparent authority cannot be established on the acts of the agent alone. [Cita-

> tion omitted.] The principal must have created an appearance of authority to be held liable for the acts of the agent. [Citation omitted.]
>
> A principal usually creates the appearance of authority by the following methods: (1) direct, express statements; (2) placing the agent in a "position" which, according to the ordinary habits of people in the locality, trade or profession, denotes a certain kind of authority; and (3) authorizing an agent to carry out a course of acts, which gives the appearance that the agent is authorized to carry out subsequent acts. [Citation omitted.]

Alternative expressions of the concept are that apparent authority "is that authority which a reasonably prudent man, using diligence and discretion, in view of the principal's conduct naturally would suppose the agent to possess," *State v. Delacruz*, 977 S.W.2d 95, 99 (S.D. Mo. App. 1998), and:

> [W]here a person, by his acts or conduct, has knowingly caused or permitted another to appear as his agent to the injury of a third person, who has dealt with the apparent agent in good faith and in the exercise of reasonable prudence, he will afterwards be estopped to deny the agency when the third person seeks to hold him to account.

Id.

Considered in its entirety, but with particular reference to Paragraphs 17

through 24, Count I pleads the fundamental elements of ostensible agency under the *Nazeri* and *Sullivan* standards (Claim 1). Petitioner has alleged that she had no voice in the selection of her physicians; that she reasonably relied on the hospital to select competent physicians for her; that the hospital in essence selected Drs. Brocksmith and Danuser to provide Petitioner with health care services; that no one informed her that Drs. Brocksmith and Danuser were not employees of the hospital (thereby, implicitly, giving her an opportunity to seek other health care providers), and as a result of the hospital's selection Petitioner suffered the damages specified in Paragraph 59 of Count I due to the negligence of Drs. Brocksmith and Danuser.

Miss Nickel's counsel has so far found no case specifically holding that the silence of the principal as to its relationship with the ostensible agent constitutes acquiescence in the agency, yet that concept is implicit in the language of *Delacruz* and *Ritter*.

When a patient goes to a hospital for treatment and looks to the hospital to provide her with appropriate health care personnel for that treatment, it is the hospital and only the hospital which possesses the knowledge of which individuals available at that time to provide such services are employees and which are not. If "Dr. Jane Doe" is a hospital employee who negligently injures a patient, the hospital is vicariously liable for those injuries. If "Dr. Doe" is an independent contractor, the hospital will seek to avoid vicarious liability on that basis, even if the acts of

negligence and the injuries in this hypothetical are identical.

But in this hypothetical, the patient has detrimentally relied on the hospital to select her health care providers. The vast majority of patients are obviously not legal experts; they cannot legitimately be expected to determine who is or who is not a hospital employee. All the patient knows is that she has walked in the door (or been brought in); she sees nothing to distinguish employees from non-employees; no one identifies employee physicians and non-employee physicians. Instead, the silence by the primary source of knowledge about the nature of the relationship between the hospital and the health care providers constitutes an implicit representation by the hospital that as a result of their mere presence and use of the hospital's facilities, they are hospital employees who are qualified to provide the health care services. A hospital should not be allowed to hide behind its silence and its failure to disclose to patients which health care providers rendering health care services to the patient are hospital employees and which ones are independent contractors. Miss Nickels has therefore met the *Nazeri* and *Sullivan* standards with reference to her medical malpractice claim against Lifemark arising out of the alleged negligence of Drs. Brocksmith and Danuser.

The third claim (lost chance of recovery based on ostensible agency) also meets the *Nazeri* and *Sullivan* standards for the reasons given above, since the only difference between the two claims is the difference in the nature of the damages

claimed.

Section 7. The "Improper Joinder" Argument

Lifemark has argued that Miss Nickels' claims against it were improperly joined with the claims against the other defendants because the injuries she suffered, inferentially as a result of the alleged negligence of Lifemark employees, were entirely different from the injuries allegedly caused by other defendants, and no allegation was made that the nursing staff at Lifemark acted with the other defendants.

The response to that argument can be found in this Court's decision in *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. 1986) (en banc). This Court said at 672-673:

> By familiar law, a person who negligently causes an accident is liable for all damages caused by the accident, including malpractice damages for negligent treatment of the resulting injuries. The medical defendants, however, are liable only for that portion of the total damages which is caused by their malpractice. The two sets of defendants, then, may be liable jointly and severally for a portion of the plaintiff's damages.

And later at 673:

> We now hold that when there are several defendants, some individuals and some corporations, and when they may share liability for all or

> part of the plaintiff's claim against them, suit may be brought in the county in which any defendant resides pursuant to §508.010, RSMo 1978. The presence of an additional claim against one defendant, in which others are not involved, should not stand in the way. [Footnote omitted.]

A careful reading of the Petition under the standards of *Nazeri* and *Sullivan* shows that Miss Nickels has alleged that she was in the hospital because of the prior negligence of other health care providers and while in the hospital she suffered further medical negligence. The prior negligent health care providers are thus liable for all the "downstream" consequences of their negligence, including the negligence of Lifemark (whether directly or vicariously), while Lifemark is liable only for its proportionate share of Miss Nickels' total damages. Under the *Bitting* standards suit was properly filed in St. Louis County, since Lifemark chose to have its registered agent in St. Louis County.

Section 8. Extraordinary Writs

A writ of mandamus has been used to address issues of pretensive joinder, *e.g.*, where the transfer of the case has already occurred and the writ is used to compel the re-transfer of the case to the original county in which it was filed. *Breckenridge*, *supra*, at 902 and 904 ("Section III"), and *Malone*, *supra*. A writ of prohibition has also been used to prevent the enforcement of an order to transfer a

case, *i.e.*, where the transfer has been ordered but the physical transfer had not yet taken place as of the time of the issuance of the alternative writ. *State ex rel. Cross v. Anderson*, 878 S.W.2d 35 (Mo. 1994) (en banc).

From the record it appears that two physical files exist for the underlying case: the original file which is still in St. Louis County, and the duplicate file which is in Boone County. Given this apparently unusual factual setting, either or both mandamus and prohibition may be appropriate for the Court to achieve the result of "returning" the case file to St. Louis County and requiring Judge Vincent to reinstate all of Miss Nickels' claims against all parties and proceeding with the case.

Section 9. "Failure to State a Claim" Summary and Conclusion

Miss Nickels has pled five claims against Lifemark. *Nazeri* and *Sullivan* require only that all of the elements of a recognized cause of action, or of a cause of action which might be recognized in the case, be pled in the original petition. Claims 1 and 3 pled Lifemark's vicarious liability for the medical negligence of Drs. Brocksmith and Danuser based on ostensible or apparent authority, resulting in either the Paragraph 59 damages or a lost chance of recovery. Claims 2 and 4 pled Lifemark's vicarious liability for the medical negligence of its own employees, resulting in either the Paragraphs 56 and 59 damages or a lost chance of recovery. Claim 5 pled Paragraph 59 damages to Miss Nickels as a result of the direct corporate negligence of Lifemark.

Miss Nickels has met the standards of pleading necessary to survive a motion to dismiss for failure to state a claim upon which relief can be granted. She has also met the less stringent standards established by this Court in *Malone*, *supra*, since the Petition demonstrates on its face that under the standards of Rule 55.03(b)(2) she has "put forward a claim...under existing law" (ordinary vicarious liability and ostensible agency) and has also made "a non-frivolous argument for the establishment of new law" (adoption of the doctrine of corporate negligence).

Pleading the elements of any *one* of the five claims against Lifemark would be sufficient to preclude a determination that Petitioner has failed to state a claim upon which relief can be granted (thereby also precluding a finding of pretensive joinder), and Miss Nickels has sufficiently pled all five claims. Judge Vincent therefore exceeded his authority in dismissing Miss Nickels' claims against any defendant, but particularly Lifemark, and Judge Vincent exceeded his authority in ordering the case transferred to Boone County. A permanent writ should be issued requiring that the case be returned to St. Louis County, and that all of Relator's claims against all parties, including but not limited to Lifemark, be reinstated.

POINT II.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating

all of Relator's claims which were dismissed because the various Defendants in the underlying suit who sought dismissal or transfer for pretensive joinder/improper venue failed to meet their burden of proof and persuasion that the record, pleadings and facts presented in support of the motions asserting pretensive joinder established that there is, in fact, no cause of action against Lifemark and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Lifemark in that: (a) Judge Vincent stated he would not consider any matters outside the Petition without first giving notice to the parties and giving Relator an opportunity to respond, and since no such notice was given, any consideration of matters outside the Petition would constitute a violation of Relator's due process rights under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice and a meaningful opportunity to be heard before their claims against Lifemark can be dismissed with prejudice and the case transferred to Boone County, and (b) even if considered, the

matters outside the Petition which were submitted to Judge Vincent were insufficient to establish that all five claims against Lifemark were invalid, in part because the Brocksmith affidavit contained inadmissible hearsay; the Poehling affidavit constituted inadmissible hearsay, and the Mueller affidavit merely certified the accuracy of the photocopying of Miss Nickels' hospital records, and (c) the movants offered no evidence to demonstrate that the state of knowledge of Relator and her counsel at the time the Petition was filed was such that the information would not support a reasonable legal opinion that a case could be made against Lifemark, particularly in view of the allegations of a new theory of recovery proposed to be adopted in the underlying case.

Section 1. Standard of Review

Prohibition is the proper method by which to test whether a trial judge has acted in excess of his jurisdiction because of improper venue. *State ex rel. Reedcraft Manufacturing, Inc. v. Kays*, 967 S.W.2d 703, 707 (S.D. Mo. App. 1998). The standard of review is contained in *Breckenridge, supra*.

Section 2. Due Process Argument

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), the Supreme Court of the United States said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.]

Citing *Mullane*, albeit in a factually distinct context, the Western District of the Missouri Court of Appeals has said:

> Notice is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." *Division of Employment Sec. v. Smith*, 615 S.W.2d 66, 68 (Mo. banc 1981) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950)). The notice must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id.*

Forms World, Inc. v. Labor and Industrial Relations Commission, 935 S.W.2d 680, 684 (W.D. Mo. App. 1996).

Although the attachments to the Lifemark Motion to Dismiss provide "notice" as to the outside-the-Petition basis for Lifemark's arguments, there was no notice in the constitutional sense where the trial judge expressly stated he would not consider anything outside the pleadings (at that point solely the Petition) unless he gave prior notice to the parties and provided Miss Nickels with thirty days in which to respond to those outside-the-Petition matters. No such notice of consideration of outside-the-Petition matters was given, especially in light of the issuance of the ruling only nine days after taking the issue of pretensive joinder under submission. It is patently obvious, therefore, that Miss Nickels had no meaningful opportunity to be heard in opposition to the outside-the-Petition matters. Any consideration by Judge Vincent of those outside-the-Petition matters would have constituted a violation of Miss Nickels' due process rights, as would any such consideration at this stage of the proceedings.

Judge Vincent stated, in essence, that he would not consider the alternative method of determining pretensive joinder, *i.e.*, (a) whether the record, pleadings and facts presented in support of the motions asserting pretensive joinder established that there is, in fact, no cause of action against Lifemark and (b) whether the information available at the time the petition was filed would support a reasonable legal opinion that a case could be made against Lifemark, unless he notified the parties of his intent to do so and gave Miss Nickels thirty days in which to respond. As a di-

rect result of the lack of such notice, there is no response from Miss Nickels to the non-Petition matters in the record before the trial court or this Court. In view of this commitment by Judge Vincent and the lack of any such notice and opportunity to respond, it would be inappropriate for this Court to consider anything outside the Petition itself in ruling on this case.

However, even if the outside-the-Petition matters are considered, Lifemark and the other pretensive joinder movants failed to establish *both* required elements of the alternative method of determining whether to dismiss a case for pretensive joinder.

Section 3. The Insufficiency of the Lifemark Affidavits

By making this argument, Miss Nickels does not waive her claim that *any* consideration of matters outside the Petition is a violation of her due process rights, given the commitment by Judge Vincent to give her an opportunity to respond before he considered such matters.

The first affidavit offered by Lifemark was that of James T. Brocksmith, D.O. [Rel. Writ Ex. H-1, Rel. Pet. Vol. 2 at 138-140.]

With apparent reference to the theory of ostensible agency, Dr. Brocksmith makes allegations about his belief concerning the state of mind and the knowledge of Miss Nickels, *id.* at 149, ¶ 8, 9. The allegations in the Petition are otherwise, which at a minimum raises a factual dispute about what she knew and when she

knew it, thus making. What Lifemark has also overlooked, however, is that Dr. Brocksmith's affidavit only addresses (to the extent it does so), the ostensible agency issue with reference to *him*. Similar ostensible agency allegations have been made concerning Defendant Carol B. Danuser, M.D. ("Dr. Danuser") and the Brocksmith affidavit certainly can not be deemed to dispose of those claims.

In Paragraph 10 of his affidavit, *id.* at 139-140, Dr. Brocksmith talks about his understanding of the contents of certain documents and matters about which he was "informed" and relates that to the best of his knowledge Miss Nickels signed certain documents.

The purpose of an affidavit is to state facts and not conclusions. *Fitzpatrick v. Hoehn*, 746 S.W.2d 652, 654 (E.D. Mo. App. 1988). An affidavit that does nothing more than relate information gained from other sources or other documents relates hearsay, and not facts that would be admissible in evidence. *Allen v. St. Luke's Hospital of Kansas City*, 532 S.W.2d 505, 508 (W.D. Mo. App. 1975). *See also, Perry v. Kelsey-Hayes Company*, 728 S.W.2d 278, 280 (W.D. Mo. App. 1987), citing *Allen*, *supra*.

Paragraph 10 clearly qualifies as inadmissible hearsay because Dr. Brocksmith is repeating information from others and does not assert that he was present each and every time Miss Nickels allegedly signed the documents referred to. There is also no proof in the record of the circumstances under which Miss Nickels

signed such documents, or even *if* she signed such documents.

In Paragraph 11, Dr. Brocksmith purports to offer an expert medical opinion about whether the injuries Miss Nickels is alleged to have suffered could have been caused in whole or in part by Lifemark personnel, or as a result of the violations of the doctrine of corporate negligence alleged in Count III. Although Dr. Brocksmith identifies himself as a physician, merely being a physician does not *ipso facto* make him qualified to offer expert opinions on anything and everything to do with health care services. He has provided no information which would demonstrate his competence to offer testimony on the standard of care of hospital employees, or the standard of care of a hospital under a theory of direct corporate negligence. Nor did he demonstrate his competence to offer testimony on the issues of liability or causation.

A medical expert testifying at trial obviously can not get on the witness stand, testify "I am a physician and to a reasonable degree of medical certainty the defendants did not cause the plaintiff's injuries" and then walk away. While a medical expert can certainly testify about his expert opinion, he must also have a factual basis to support that opinion. No such factual basis was provided by Dr. Brocksmith for his sweeping conclusion.

The Poehling affidavit suffers in its entirety from the hearsay flaw. From beginning to end the affidavit is nothing more than a recitation of information from

other sources, and with no representation that anything in the affidavit is based on his personal knowledge. As such the affidavit contains inadmissible hearsay and cannot support Lifemark's arguments. In addition, the *Poehling* affidavit doesn't address the corporate negligence claim made by Miss Nickels.

The Mueller affidavit is simply an affidavit attesting that the accompanying medical records are true and correct copies of the original medical records in Miss Nickels' file. Of course, the mere fact that something is written in a medical record doesn't mean that the event "recorded" in fact happened, or happened in the way it was recorded. The medical records also say nothing about the rules and regulations of the hospital and what steps, if any, the hospital took to oversee persons who provided health care services on its premises and under its imprimatur.

Considered in the aggregate—and without considering Judge Vincent's commitment to providing Miss Nickels with thirty days in which to respond to the outside-the-Petition materials—the affidavits are insufficient to meet the first prong of the second method of dismissing a case for pretensive joinder, *i.e.*, the affidavits do not establish that under no circumstances could Miss Nickels make a valid claim against Lifemark under any of the five theories of recovery pled against it.

Section 4. Plaintiff's (Relator's) Knowledge

The second prong of the second method of dismissing a case for pretensive joinder is that the movant must establish "the information available at the time the

petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant." *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo. 1994) (en banc).

No evidence was presented by the movants in support of the pretensive joinder motion concerning the state of knowledge of Miss Nickels and her counsel at the time the Petition was filed. As this Court has pointed out, the movants have to demonstrate that "the facts known to plaintiffs when suit was filed did not support a reasonable legal opinion that a valid claim existed." *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 193 (Mo. 1998) (en banc). The only "evidence" before Judge Vincent at the time of his ruling on May 18, 2001, about what was known to Miss Nickels and her counsel at the time of the filing of the Petition is what is reflected in the Petition itself. An examination of the Petition in that context leads to the conclusion that consistent with the requirements of Mo. R. Civ. P. 55.33(b), Miss Nickel's counsel had a reasonable belief, based on information actually known to Miss Nickel's counsel at the time the Petition was filed, that the alternative theories of recovery pled against Lifemark were valid claims. And even if subsequently-acquired knowledge might at some point destroy the validity of one or more of the five claims, as this Court pointed out in *Breckenridge, supra*, at 903, a plaintiff may not be penalized on the basis of knowledge not acquired until after the filing of the petition.

Except to the extent the Petition itself constitutes evidence of the state of knowledge of Miss Nickel's counsel at the time the Petition was filed, none of the movants offered any evidence to prove the state of that knowledge. And in order to succeed in obtaining a determination of pretensive joinder based on the second *Breckenridge* standard, the movants *must* prove that information in the possession of Miss Nickels' counsel could not and in fact did not support a reasonable legal opinion that all or any of the five claims against Lifemark were valid. No such evidence was offered by any of the movants.

Section 5. Summary and Conclusion

Under the particular factual circumstances of this case, any consideration of matters outside the Petition in ruling on the pretensive joinder motions would violate Miss Nickels' right to due process under the Fourteenth Amendment to the Constitution of the United States and Article I, §10 of the Constitution of Missouri. But even if the affidavits supplied by Lifemark are considered, they are insufficient to establish that none of the five alternative claims pled against Lifemark were valid. And in addition, there was no evidence before the trial court from the various movants to sustain their burden of proof and persuasion that "the facts known to [Miss Nickels and her counsel] when suit was filed did not support a reasonable legal opinion that a valid claim existed." *Smith*, *supra*.

The requirements of the second method of dismissing a suit for pretensive

joinder have not been met. Judge Vincent therefore exceeded his authority in dismissing Miss Nickels' claims against any defendant, but particularly Lifemark, and Judge Vincent exceeded his authority in ordering the case transferred to Boone County. A permanent writ should be issued requiring that the case be returned to St. Louis County, and that all of Relator's claims against all parties, including but not limited to Lifemark, be reinstated.

CONCLUSION

Plaintiff-Relator more than adequately stated five separate claims for relief against Lifemark, the "resident defendant" for venue purposes. The question is not whether Miss Nickels can be successful on any or all of her claims, at trial or in persuading this Court that the corporate negligence theory is one which should be adopted, but merely whether *at the time the Petition was filed* she stated one or more claims upon which relief can be granted, either in the form of a theory of recovery already recognized, *e.g.*, vicarious liability for the negligence of employees in a negligence or lost chance of recovery case, or vicarious liability for the negligence of ostensible agents in a negligence or lost chance of recovery case, or in the form of a theory of recovery which might be adopted in the underlying suit, *i.e.*, the theory of corporate negligence. A remedial writ should be granted requiring the transfer of the underlying case back to St. Louis County and the reinstatement of all of Plaintiff-Relator's claims against all parties, to the extent that any claim against

any Defendant other than Lifemark may have been dismissed.

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CERTIFICATE OF SERVICE

One spiral-bound copy of the above and foregoing brief, and one copy on 3.5" diskette, have been mailed, postage prepaid, this 25th day of October, 2001, to:

PARTY	PARTY'S ATTORNEY
Hon. David Lee Vincent, III Respondent here Transferor judge below	Honorable David Lee Vincent, III Circuit Court of St. Louis County St. Louis County Courthouse 7900 Carondelet Clayton, Missouri 63105 314-615-1509
Hon. Frank Conley Respondent here Transferee judge below	Hon. Frank Conley Presiding Judge Circuit Court of Boone County Boone County Courthouse 705 East Walnut Columbia, Missouri 65201 573-886-4050
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CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains 11,962 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using Microsoft Word 97, and the word count was calculated by Word 97.

4. The file containing this brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on 25 October 2001, using McAfee VirusScan 4, with virus definitions updated through 24 October 2001, the most recent date for which virus definitions were available, and the file and diskettes have been found to be virus-free.

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